

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS**

NATIONAL UNION FIRE INSURANCE)
COMPANY OF PITTSBURGH, PA, a)
Pennsylvania corporation,)

Plaintiff-Counterdefendant)

Case No.: 08-CV-2187

DISCOVER FINANCIAL SERVICES,)
a Delaware corporation; DISCOVER)
BANK, a Delaware chartered bank;)
DFS SERVICES LLC, a Delaware limited)
liability company; and DISCOVER)
PRODUCTS, INC., a Utah corporation,)

Defendants-Counterclaimants.)

Judge David H. Coar
Magistrate Judge Sidney I. Schenkier

**MOTION FOR SUMMARY JUDGMENT
REGARDING PLAINTIFF-COUNTERDEFENDANT'S DUTY TO DEFEND**

Defendants-Counterclaimants Discover Financial Services, Discover Bank, DFS Services LLC, and Discover Products, Inc. (collectively "Discover"), by and through their counsel, pursuant to Rule 56 of the Federal Rules of Civil Procedure, move this Court to grant Discover summary judgment against defendant National Union Fire Insurance Company of Pittsburgh, PA ("National Union") regarding National Union's duty to defend Discover against the action titled *Phoenix Licensing, LLC, et al. v. Chase Manhattan Mortgage Corp., et al.*, currently pending in the United States District Court for the Eastern District of Texas, Case No. 2:07-cv-387 (TJW/CE) (the "Phoenix Action"). In support of this Motion, Discover states as follows:

1. This case involves National Union's breach of its contractual duty to defend and indemnify Discover against "advertising injury" within the meaning of National Union's insurance policy issued to Discover. An "advertising injury" under National Union's insurance

policy includes claims that the insured, here Discover, misappropriated "advertising ideas or a style of business."

2. Here, Discover has been sued in the Phoenix Action for allegedly misappropriating Phoenix's patented advertising ideas. Specifically, Phoenix alleges that Discover's advertising, marketing, and promoting the sale of financial products over the Internet infringes various Phoenix patents, at least two of which, according to Phoenix, cover patented advertising ideas. Despite the plain language of National Union's contractual commitment under its insurance policy, National Union has refused to defend Discover. Thus, Discover has brought this declaratory judgment action and is now moving for summary judgment regarding National Union's duty to defend.

3. For these reasons, and as stated more fully in Discover's Memorandum of Law In Support of Defendants-Counterclaimants' Motion for Summary Judgment Regarding Plaintiff-Counterdefendant's Duty to Defend, Discover is entitled to summary judgment on the issue of National Union's duty to defend it against the Phoenix Action.

DATED: September 8, 2008

DISCOVER FINANCIAL SERVICES,
DISCOVER BANK, DFS SERVICES LLC,
and DISCOVER PRODUCTS, INC.

By: /s/ Kimball R. Anderson
One of Their Attorneys

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2008, I electronically filed DEFENDANTS-COUNTERCLAIMANTS' MOTION FOR SUMMARY JUDGMENT REGARDING PLAINTIFF COUNTERDEFENDANT'S DUTY TO DEFEND with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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